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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

MANUEL LUJAN, JR.,
SECRETARY OF THE INTERIOR,
Petitioner,

v.

DEFENDERS OF WILDLIFE, et al.,
Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Eighth Circuit

BRIEF OF *AMICI CURIAE* THE STATES OF TEXAS, ARIZONA, ARKANSAS, CALIFORNIA, FLORIDA, MAINE, MICHIGAN, MINNESOTA, NEW JERSEY, NEW YORK, OHIO AND VERMONT AND THE CITIES OF NEW YORK, BALTIMORE, DENVER, ELIZABETH, LOS ANGELES, SAN FRANCISCO, SEATTLE AND BROWARD COUNTY IN SUPPORT OF RESPONDENTS

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IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST OF AMICI CURIAE

Respondent's *amici*, numerous states and local governments, wish to bring to the attention of the Court an issue that threatens to have profound impact on state and local governments' ability to protect the health, safety and welfare of their citizens and residents. Cities and states could be denied access to courts to enforce the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-44, and other impor-

tant federal laws if the Court adopts Petitioner's argument advocating unprecedented restrictions on standing.

Cities and states regularly depend on environmental consultation and disclosure laws such as the ESA and the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370b, to shape significant federal actions within their jurisdictions. These laws help ensure that federal activities do not inflict ill-considered, gratuitous harm on state and local communities. Underlying Petitioner's standing arguments is a broad challenge to the right of persons injured by the federal government's failure to follow procedural, planning or informational statutes to obtain access to and redress in federal court.

Two factors are crucial to the ability of states and local governments to protect their citizens: (1) no actor can be excused or made immune from procedural and substantive requirements, and (2) the consultation and disclosure process itself must be both meaningful and enforceable. If the Court adopts Petitioner's arguments, the federal government — often the major participant in a local project — might be able simply to ignore local concerns. This result would seriously undermine state and local governments' ability to protect their citizens.

Petitioner asks the Court to mandate that a plaintiff demonstrate not only a likelihood of harm and redressability, but "definite" and "immediate" harm and certain redressability. These standards surpass constitutional requirements. In matters affecting public health and the environment, harm frequently results from the cumulative impact of many separate actions over time. Awaiting demonstrable manifestation of harm, as defined by Petitioner, would all too often eliminate meaningful and economical remedies. Petitioner fails to recognize that once the iceberg has been struck, turning the ship will do little good.

The states and cities submit this *amicus* brief to retain their ability to guard the public health and safety of their citizens and their power to preserve and enhance their natural resources. Existing standing law preserves the

rights of states and local governments to seek judicial redress for violations — procedural or substantive — of requirements that Congress has established to protect the public health and environment. Petitioner would render many of these requirements unenforceable by state and local governments. Respondent's *amici* urge this Court to maintain the delicate balance in this important area of local and federal relations, to resist Petitioner's sweeping arguments and to decide the case on the basis of existing standing law.

SUMMARY OF THE ARGUMENT

The enforcement of procedural statutes is both well-established and critical to the protection of the public health, safety and welfare. The ostensibly advisory nature of the ESA and similar congressionally-mandated procedures does not defeat standing; rather, standing is well-recognized where a plaintiff otherwise meets standards established under Article III of the Constitution.

In this case, Petitioner posits intolerably exacting Article III standards. The Court's prior rulings make plain that a plaintiff need not wait until harm is certain before turning to the courts; nor demonstrate traceability with absolute certainty; nor prove that a favorable decision will redress the stated injury.

Petitioner's unprecedented limits on standing would eviscerate the states' and cities' ability to protect the health, safety and welfare of their citizens. Accordingly, the state and local governments urge this Court to reject Petitioner's position.

ARGUMENT

I.

STATES AND CITIES MUST BE ABLE TO ENSURE THAT FEDERAL AGENCIES COMPLY WITH PROCEDURES ENACTED TO PROTECT THEIR CITIZENS' HEALTH, SAFETY AND WELFARE

The Petitioner uses this case as a platform to launch a broad and baseless assault on the rights of *amici* and others to protect interests legitimately within their purview when they enforce procedural aspects of congressionally-enacted statutes in federal court. Such statutory provisions can be of extreme importance to *amici*. The Solicitor General is flatly mistaken in arguing that standing to enforce federal procedures is a "novel" notion; to the contrary, it is well-established. Hence, Petitioner's account of the causation and redressability legs of standing law, which would bar most, if not all suits to enforce procedural statutes, cannot be correct, and this Court should reject the misguided invitation to bar such suits.

A. The Important Right To Enforce Procedural Statutes Is Not "Novel"

Amici are gravely concerned by Petitioner's references to the "supposed 'procedural injury'" suffered by Respondents (Brief for the Petitioner [hereinafter "Pet. Br."] at 18) and by the assertion that standing to seek a remedy for such injury is a "novel theory." *Id.* at 29. Standing to require federal agencies to comply with statutes designed to promote better, cleaner and safer living conditions and an improved environment is of critical importance to *amici*. It is also firmly established.[1]

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1. The Court has repeatedly recognized, in other contexts, that procedural interests are important and worthy of protection. Indeed, the violation of procedures ranging from Fourth Amendment search and seizure restrictions to the Federal Rules of Civil Procedure and the

(continued. . .)

State and local governments regularly rely on congressionally-enacted procedural, planning and informational provisions to reduce the risk of harm to their citizens. For example, in addition to the ESA, NEPA, the Emergency Planning and Community Right-to-Know Act ("EPCRA"), 42 U.S.C. §§ 11001-50, the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq.*, and the Coastal Zone Management Act ("CZMA"), 16 U.S.C. §§ 1451-64, all contain one or more significant procedural or informational components for federal agency compliance upon which cities and states rely.

Standing based on the failure to comply with procedural statutes has been accepted by each circuit of the federal Court of Appeals that has explicitly considered the question. *See, e.g., McGarry v. Secretary of the Treasury*, 853 F.2d 981, 984 (D.C. Cir. 1988) (discussing ERISA standing: "This court has made clear in the past that litigants have standing to bring actions to vindicate procedural rights guaranteed by statute.");[2] *Munoz-Mendoza v. Pierce*, 711 F.2d 412, 428 (1st Cir. 1983) (failure to perform required racial impact study required by HUD procedures was injury-in-fact sufficient for standing); *Motor Coach Industries, Inc. v. Dole*, 725 F.2d 958, 964 n.5 (4th Cir. 1984)

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1 *(. . . continued)*

Federal Rules of Evidence all give rise to a right of redress — whether or not it can be proved at the outset that a correction of the procedural violation would or even might yield a different result on the merits. *See, e.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 431 (1982), where the Court held that "[t]he right to use [state law] adjudicatory procedures shares [the] characteristics" of a property interest protected by the due process guarantees of the Fourteenth Amendment.

2. *See also Nat'l Wildlife Fed'n v. Hodel*, 839 F.2d 694, 712 (D.C. Cir. 1988) (under NEPA, plaintiffs have the right to enforce preparation of an environmental impact statement ("EIS")); *Nat'l Maritime Union of Am. v. Commander, Military Sealift Command*, 824 F.2d 1228, 1237 (D.C. Cir. 1987) (disappointed bidder has procedural right to legally valid procurement process); *Nat'l Conservative Political Action Comm. v. Federal Election Comm.*, 626 F.2d 953, 957 (D.C. Cir. 1980) (agency's procedural violation of Federal Election Campaign Act, 2 U.S.C. §§ 431 *et seq.*, provided proper basis for standing).

(failure to follow procurement statutes and regulations is sufficient injury for standing purposes); *South East Lake View Neighbors v. Dep't of Housing & Urban Dev.*, 685 F.2d 1027, 1038 (7th Cir. 1982) (NEPA grants a procedural right in the agency decision-making process); and *Friends of the Earth v. United States Navy*, 841 F.2d 927, 932 (9th Cir.), *modified*, 850 F.2d 599 (1988) ("This court has long recognized that failure to follow [NEPA] procedures designed to ensure that the environmental consequences of a project are adequately evaluated is a sufficient injury in fact to support standing").[3] In each of these cases, the circuit court recognized that the violation of a procedural right itself, not the substantive harm arising out of the procedural violation, as Petitioner urges, can satisfy the injury-in-fact requirement for standing.

B. The Ostensibly Advisory Nature Of The ESA Consultations And Other Statutorily Mandated Agency Procedures Does Not Render Them Unenforceable

Indisputably, suits to remedy a procedural wrong must meet constitutional standards for injury, traceability and redressability. *See, e.g., Int'l Primate Protection League v. Tulane Education Fund*, 111 S.Ct. 1700, 1704 (1991). Thus,

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3. *See also Fernandez v. Block*, 840 F.2d 622, 631 (9th Cir. 1988) (invasion of procedural rights created by Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461, "sufficient to establish the requisite injury in fact"); *Or. Envtl. Council v. Kunzman*, 817 F.2d 484, 491 (9th Cir. 1987) (procedural failures in EIS preparation provide sufficient injury in fact to support standing); *Trustees for Alaska v. Hodel*, 806 F.2d 1378, 1380 (9th Cir. 1986) (violation of procedural rights under NEPA and its regulations sufficient for standing); *Dellums v. Smith*, 797 F.2d 817, 821 (9th Cir. 1986) ("Congress may . . . create procedural rights, the invasion of which constitutes injury-in-fact and suffices to support standing."); *Western Oil & Gas Ass'n v. Envtl. Protection Agency*, 633 F.2d 803, 808 n.4 (9th Cir. 1980) (injury caused by failure to comply with the procedures of the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, sufficient to support standing); *City of Davis v. Coleman*, 521 F.2d 661, 670-72 (9th Cir. 1975) (failure to prepare an EIS in compliance with NEPA's procedures found to be sufficient injury to support standing).

amici agree that geographic nexus between the Respondents here and an area affected by the violation alleged is an appropriate — and may be a necessary — measure of the concreteness of a plaintiff's personal stake. *Amici* cannot agree, however, with the Solicitor General's unprecedented and untenable argument that because of the advisory nature of the challenged regulation, the requisite redressability is necessarily missing from this case. In the first place, the regulation is in no sense "non-binding." In the second, to the extent that consultation under Section 7 of the ESA, 16 U.S.C. § 1536, does not guarantee substantive results, this is a feature shared by numerous other statutes, the enforceability of which is well-established.

1. Consultation Is Not An Optional Process

In arguing that revision of the regulation at issue would not redress Respondents' complaint, the Solicitor General repeatedly and wrongly characterizes the regulation as "non-binding." Pet. Br. at 24 and 25. This assertion, made without support, cannot be reconciled with the Petitioner's role as the official with "primary responsibility for implementing Section 7," (*Nat'l Wildlife Fed'n v. Coleman*, 529 F.2d 359, 371 (5th Cir.), *cert. denied*, 429 U.S. 979 (1976), or with his express statutory authority for such regulations. *See* 16 U.S.C. § 1540(f). It is equally at odds with Petitioner's own well-documented position on the mandatory nature of consultation. For example, when the Secretary of the Interior (the "Secretary") gave notice of adoption of the regulation in question, he cautioned that "all Federal actions including 'conservation programs' are subject to the consultation *requirements* of section 7(a)(2) . . . ." 51 Fed. Reg. 19,929 (1986) (emphasis added). Similarly, the regulations note that consultation is "required" unless otherwise excused by the regulations, or the terms of the statute, and establish procedures for Petitioner's delegate, the Director of Fish and Wildlife Service, to initiate consultation with dilatory agencies. *See* 50 C.F.R. § 402.14(a).

The courts, too, have made it plain that consultation is not optional. Although each federal action agency must ultimately decide whether its project may jeopardize endangered species, this decision can be made only after action agencies have fulfilled their procedural duties under Section 7. *Sierra Club v. Froehlke*, 534 F.2d 1289, 1303-1304 (8th Cir. 1976) (the responsibility for decision *after consultation* is not vested in the Secretary, but in the action agency); *National Wildlife Fed'n v. Coleman*, 529 F.2d at 371 (*once the action agency has had meaningful consultation* with the Secretary, the final decision of whether or not to proceed lies with the action agency). Thus, Section 7's procedural requirements are a necessary prerequisite to an action agency's decision-making process.

In addition, Section 7's formal consultation process creates an administrative record upon which federal courts rely in determining whether federal action agencies have satisfied their Section 7 substantive duties.[4] Courts give substantial weight to "biological opinions" produced by the Secretary as a result of consultation, when assessing an action agency's compliance with the ESA. *See Roosevelt Campobello Int'l Park Comm. v. United States Envtl. Protection Agency*, 684 F.2d 1041, 1049 (1st Cir. 1982). Thus, even if Section 7's formal consultation process were somehow optional, federal agencies would, as a practical matter, have a strong incentive to avail themselves of it.

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4. *See, e.g., Pyramid Lake Paiute Tribe of Indians v. United States Dept. of Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990) (U.S. Navy was entitled to rely on opinions of Fish and Wildlife Service in meeting its ESA duties); *Bergen County v. Dole*, 620 F. Supp. 1009, 1063 (D.N.J. 1985), *aff'd*, 800 F.2d 1130 (3d Cir. 1986) (federal agencies were entitled to rely upon consultation with U.S. Fish and Wildlife Service in discharging their duties under the ESA section 7 (a) and (c)); *North Slope Borough v. Andrus*, 642 F.2d 589, 610 (D.C. Cir. 1980) (no substantive section 7 violation because of compliance with final biological opinion by National Marine Fisheries Service); *Nat'l Wildlife Fed'n v. Coleman*, 529 F.2d at 375 (court of appeals would defer to Secretary to determine what modifications were necessary to bring highway project into compliance with section 7).

For similar reasons, there is no merit in the Solicitor General's argument that redressability founders on the possibility that "informal" consultations may substitute for for Section 7's requirements. Pet. Br. at 22. The proposed substitution of an *ad hoc* process for safeguards Congress mandated in the ESA cannot be squared with the great detail devoted to consultation in the statute, *see* 16 U.S.C. § 1536(b)-(d) or, for that matter, with the notion that we are a society of laws. The argument is, in fact, little more than the bare claim that executive agencies are free to ignore congressional directives.

2. Post-Consultation Agency Discretion Does Not Deprive Respondents Of Standing And The Courts Have So Recognized Under Other Statutes

The Secretary argues that the ESA consultation process mandated in Section 7 is of an advisory nature and, on that ground, cannot meet Article III's redressability (or traceability) requirement. Petitioner asserts that "action agencies are ultimately responsible for making their own decisions about what is required of them under Section 7(a)(2)" (Pet. Br. at 25), implying that the failure to consult is, in effect, irrelevant. Petitioner's analysis is as applicable to domestic projects as it is to those located overseas and, if accepted, could undermine the standing of state and local governments (and others) to protect endangered species by suing to enforce federal agencies' ESA consultation obligations on projects within their borders.

Beyond the ESA, state and local governments need to be able to, and regularly do, challenge federal agency failures to follow congressionally-mandated procedures in a variety of other statutes. *See, e.g., City of Los Angeles v. Nat'l Highway Traffic Safety Admin.*, 912 F.2d 478 (D.C. Cir. 1990); *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975); and *United States v. 27.09 Acres of Land*, 760 F. Supp. 345 (S.D.N.Y. 1991). Yet Petitioner would have such suits dismissed because "the causal connection between the

interpretative regulation and the asserted injury . . . is 'highly indirect'" and "the prospect of redress . . . correspondingly speculative." Pet. Br. at 26 and 27. Without "assurance" that a project will be redesigned or stopped as a result of judicial action, under Petitioner's theory these plaintiffs would have lacked standing.

Given the extreme number and range of established causes of action to which it would apply, Petitioner's argument is simply untenable. The wholesale reversal of firmly established law that would follow from this Court's acceptance of this argument is perhaps most obvious in the context of NEPA cases. NEPA requires federal agencies to prepare an environmental analysis of the impact of their actions but does not require implementation of any particular substantive measures. Thus in *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989), the Court acknowledged that it is unnecessary to demonstrate that remedying a procedural error will remedy a substantive harm. The Court reasoned that "[o]ther statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed — rather than unwise — agency action." *Id.* at 351. As a result, an EIS may have no impact whatsoever on a potentially harmful project, but this Court has consistently entertained suits that sought to decrease the likelihood of inadvertent environmental harm through enforcement of NEPA's procedural mandates.[5]

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5. *See, e.g., Marsh v. Or. Natural Resources Council*, 490 U.S. 360 (1989) (standing not questioned in reviewing organization's claim that a supplemental EIS was required); *Baltimore Gas and Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87 (1983) (standing not questioned in reviewing Nuclear Regulatory Commission regulations governing consideration of environmental impact of nuclear power plant license; also affirming the information function of NEPA); *Weinberger v. Catholic Action of Hawaii / Peace Educ. Project*, 454 U.S. 139 (1981) (not questioning standing of organizations to challenge Navy's failure to disclose publicly an EIS concerning construction of facility capable of storing nuclear weapons); *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223 (1980) (not questioning standing in reviewing adequacy of agency's consideration of environmental impact).

Petitioner unpersuasively seeks to distinguish cases in which standing was found based on procedural violations of NEPA, by differentiating the EIS public information function from the ESA's consultation process. Pet. Br. at 29 and 30. This distinction does not withstand analysis. Because NEPA procedures are purely procedural in nature, violations of NEPA can never cause substantive impacts that would satisfy Petitioner's redressability arguments. The failure to generate or supply the requisite information would never require that a federal agency take a particular course of action on any parcel of land. Rather it would create only an abstract "informational" injury without any resultant substantive impacts on a physical site. Consequently, the Secretary's argument that Respondents lack standing because of the nature of the ESA consultation process applies with equal force to NEPA's procedural requirements.

Moreover, NEPA is by no means the only illustration of why it is irrelevant that ESA consultation does not guarantee a substantive outcome. Demanding that a plaintiff provide "assurances" of substantive redressability would lead to absurd results under other statutes. It would be, for example, difficult to prove the substantive results of an emergency evacuation plan or an inventory of toxic chemicals. *See, e.g.*, EPCRA, 42 U.S.C. §§ 11003, 11022. And the CZMA, a crucial planning tool for coastal governments, has consultative provisions almost identical to Section 7(a)(2) of the ESA. *See* 16 U.S.C. § 1456(a) and (c)(1). Similarly, notice and comment rulemaking under the APA, 5 U.S.C. § 553, is designed to ensure that federal agencies have the views of interested parties before them, not that they adopt those views or reach a specific substantive decision. Such procedures are just as "advisory" as the ESA consultation.

It is not surprising, therefore, that courts that have addressed this issue have found no redressability defect simply because no substantive vindication was assured. For instance, Judge Bork addressed Article III's traceability requirement with regard to a procedural injury in *Nat'l Maritime Union*. Discussing the standing of a disappointed

bidder in a government procurement process, Judge Bork stated: "[A] bidder's right to a fair procurement is obviously an injury both traceable to the alleged illegality in a procurement and redressable by any remedy that eliminates the alleged illegality." *Nat'l Maritime Union*, 824 F.2d at 1237-38 (footnote omitted). Judge Bork also noted that if the underlying substantive economic injury were held to be the sole basis of the disappointed bidder's standing, traceability problems would be likely (presumably because, even had proper procedures been followed, the disappointed bidder might not have been awarded the contract). *Id.* at 1238, n.13. Elsewhere, the D.C. Circuit explained that "[i]t is a well-established rule that a party suing to vindicate such [procedural] rights need not make a showing that the agency would have acted differently." *McGarry*, 853 F.2d at 985. *See also Munoz-Mendoza*, 711 F.2d at 428 ("Article III of the Constitution does not require a plaintiff to show that use of a mandated procedure would change an agency's substantive action."); *id.* at 428-29 ("if plaintiffs were required to show that different procedures would result in different substantive choices, federal courts would be required to pass judgment, in the guise of a standing inquiry, upon substantive issues that agencies rather than courts ought to resolve in the first instance.").

II.

PETITIONER SUGGESTS INTOLERABLY EXACTING STANDARDS FOR ALL FACETS OF THE INQUIRY INTO CONSTITUTIONAL STANDING

In addition to its untenable position on "advisory" procedures, Petitioner's brief also invites this Court to engage in an across-the-board reformulation of the established constitutional prerequisites for Article III standing. The suggested standards for injury-in-fact, traceability and redressability would deprive many legitimate claims, often asserted by *amici*, of a hearing in federal court. However ill-advised these standards may be as a general matter,

they are even more indefensible where Congress has enacted an explicit citizen suit provision.

A. Would-Be Plaintiffs Need Not, As Petitioner Asserts, Wait Until Harm Is Certain Before Turning To The Courts

Amici leave to the parties the debate over whether the specific affidavits in this case suffice to establish standing for Defenders of Wildlife ("Defenders"). *Amici*'s principal concerns have to do with the standards by which such affidavits are judged (and as discussed in Part I, with arguments to the effect that no affidavits could suffice for the type of claim asserted here). Most striking and troubling of those advocated by Petitioner are the ones relating to certainty and immediacy of injury.

Petitioner's proposal that Defenders be required to demonstrate concrete substantive harm with absolute certainty, *see* Pet. Br. at 17, 20, 23 and 24, ignores the time-honored principle that *threatened* harm is sufficient to form a basis for standing. *See, e.g., Heckler v. Mathews*, 465 U.S. 728, 738 (1984); *Valley Forge Christian College v. Am. United For Separation of Church and State*, 454 U.S. 464, 472 (1982); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979). This allows "those who plausibly anticipate future injury to bring suit." *Nat'l Wildlife Fed'n v. Hodel*, 839 F.2d at 705. *See also Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289 (1979) (threatened harm from enforcement of Arizona statute sufficient to form basis for standing).[6]

In addition, the Secretary's demand for an extraordinary degree of certainty in the demonstration of substan-

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6. Petitioner's arguments could also threaten standing to challenge statutes with substantive requirements such as the Clean Water Act, 33 U.S.C. §§1251-1387, or the Clean Air Act, 42 U.S.C. §§7401 *et seq*. One can rarely show that a single discharge is causing a measurable increment of harm or that cessation of a discharge would guarantee a measurable improvement. Yet the Court has affirmed the right to bring such suits. *See, Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49, 65 (1987).

tive harm runs contrary to the remedial purposes of statutes such as the ESA and NEPA. If a plaintiff must wait until endangered species are jeopardized to enforce the procedures that Congress designed to prevent that occurrence, the usefulness of the congressional ounce of prevention provided by the ESA's consultation process is greatly diminished. And, once an endangered species becomes extinct, although a plaintiff may then be able to demonstrate harm under the Secretary's scheme, even a judicial pound of cure can never bring back the lost species.

This is precisely the position in which Petitioner would leave those seeking to enforce the ESA's procedural and substantive constraints on federal agency actions. Because the ESA requires no additional action — other than consultation — before commencement of a project, if plaintiffs cannot challenge failure to consult they will apparently have to await the project's start before seeking to force consultation. By then it may be too late: irremediable harm to species may already have occurred.[7]

B. Petitioner's Characterization Of The Standards For Traceability And Redressability Are Equally At Odds With Esta blished Law

Petitioner's demand that Defenders demonstrate traceability with absolute certainty badly overstates constitutional strictures. Article III requires only that a plaintiff demonstrate a substantial likelihood that the defendant's action would result in the injury claimed. *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 77-78 (1978). The essence of the standing requirement is merely to de-

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7. Similarly unconvincing is Petitioner's suggestion that in this case Respondents' standing should depend on whether at all times at least one Defenders' member is stationed in the Nile crocodile's habitat (thus meeting the Secretary's proposed requirement that Defenders' members engage in "on-going visits" to the disputed sites). Pet. Br. at 23. Nor should Defenders' standing rest on whether Joyce Kelly has confirmed a return trip to Egypt within a short period of time (demonstrating, as the Secretary would have it, that "visits will definitely occur in the immediate future"). Pet. Br. at 23-24.

cide "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). "[S]tanding in no way depends on the merits of the plaintiff's contention that particular conduct is illegal." *Id.* at 500.

Thus, Petitioner is incorrect in arguing in effect that an analysis on the merits is necessary to determine whether specific harm results from the alleged illegal conduct. If Petitioner were correct, Defenders would be required to perform a precise, in-depth examination of the effects a federal agency action would have on endangered species, the very analysis Defenders is seeking to compel in this lawsuit. Petitioner's argument would thereby require that plaintiffs themselves supply much of the relief they seek. For that reason lower courts determining standing under NEPA have rejected the Secretary's argument. *See, e.g., City of Los Angeles*, 912 F.2d at 496; *City of Davis*, 521 F.2d at 670-71 (if this standing requirement existed, "we would in essence be requiring that the plaintiff conduct the same environmental investigation that he seeks in his suit to compel the agency to undertake.")

Petitioner's version of the redressability requirement is also much stricter than established precedent. It is a long-held principle that a party seeking judicial relief need not show to a certainty that a favorable decision will redress his injury. A mere likelihood will do. *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 261 (1977). *See also Valley Forge*, 454 U.S. at 472 and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 280-81 (1978) (observing that a plaintiff's right to be considered may not have substantive results for that plaintiff).

In a case closely paralleling this one, the Court not long ago expressly investigated standing and found adequate redressability. *See Japanese Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 222, 230 n.4 (1986). Plaintiffs, a group not unlike Defenders, sought to force a cabinet officer to follow a process designed to encourage a foreign power to reduce its impacts on marine wildlife. *Id.* at 223. The foreign power, however, remained quite free to ignore the

pressure if it so chose. Nonetheless, the Court was able easily to conclude that "respondents may avail themselves of the right of action created by the APA." *Id.* at 230 n.4.

C. Congressional Enactment Of A Citizen Suit Provision In The ESA Makes Restrictive Standing Rules Particularly Inappropriate

The Secretary's plea for imposing difficult if not impossible standing requirements is especially misplaced in this case because of the existence of a citizen suit provision. Through Section 11(g) of the ESA, 16 U.S.C. § 1540(g), Congress has explicitly authorized a broad range of parties to enforce the ESA's provisions, including Section 7's consultation requirements. Section 11 empowers "any person" to enjoin a violation of "any provision" of the ESA or regulations issued under the authority of the ESA. 16 U.S.C. § 1540(g)(1)(A). The ESA's definition of persons entitled to sue includes not only individuals and associations, such as environmental groups, but also state and local governments, such as *amici*. 16 U.S.C. § 1532(13).

Of course, as the Solicitor General points out, Congress cannot dispense with the bedrock constitutional standing requirements necessary to ensure that Article III courts hear only actual controversies. *See* Pet. Br. at 28. It is equally indubitable, however, that Congress has the power to create statutory rights, the invasion of which can provide the basis for standing. *Warth*, 422 U.S. at 500. *See also Allen v. Wright*, 468 U.S. 737, 763 (1984); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982). This is true even if the plaintiff claims an injury shared by a large class. *Warth*, 422 U.S. at 499. Recently, in *Lujan v. Nat'l Wildlife Fed'n*, 110 S.Ct. 3177, 3181 (1990), the Court noted Congress' ability to create rights of action by acknowledging that explicit statutory authorization would have provided the complainant with a separate basis on which to challenge agency administrative processes.

The Secretary has suggested that Defenders' lawsuit is not properly brought under Section 11 on the theory that

Section 7's consultation provisions do not mandate his participation and thus that his failure to consult does not violate the ESA. Pet. Br. at 29 n.18. This argument hardly squares with Section 7's explicit provisions. In Section 7, Congress prescribed a careful and detailed consultation process which requires the participation of two parties — the Secretary and the action agency. It is nonsensical to assume, as Petitioner does, that Section 7 mandates the behavior of the action agency alone and that the Secretary could with impunity thwart Congress' carefully elaborated intent by declining to engage in the prescribed consultation. ESA consultation is not optional for the Secretary, and his refusal to engage in it, whether in individual instances or by wholesale regulation, is a violation of the act, amenable to suit under 16 U.S.C. §1540(g)(1)(A).

CONCLUSION

The Court should reject Petitioner's standing analysis and enforce the congressional mandate granting a broad range of parties the right to ensure that the federal government fulfills the ESA's procedural and substantive requirements. By doing so, the Court will ensure that the nation's states and local governments can require federal agencies to take their constituents' health, safety and welfare into account, not only under the ESA but also under a host of other statutes, whose very viability is at stake in this litigation. Simply stated, adopting Petitioner's tortured standing analysis could have the effect of limiting the ability of states and local governments to protect their local environment, and could insulate federal agencies from complying with congressional directives enacted for the benefit of all.

Respectfully submitted,

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